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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1988

GENE MYERS, Guardian Ad Litem,

Petitioner,

—v.—

SHAWN KATHLEEN LEWIS,

Respondent.

CARLTON JAMES LEWIS,

Petitioner,

—v.—

SHAWN KATHLEEN LEWIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MICHIGAN COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether this Court should refuse to decide, on the facts of this case, if *Roe v. Wade* and its progeny held that only certain medically necessary abortions are constitutionally protected in the first trimester, given that the facts concerning the medical necessity of Ms. Lewis' abortion are in dispute, and no Michigan statute attempts so to restrict womens' freedom to choose abortion.

2. Whether this Court should overrule *Roe v. Wade* and its fifteen years of decisions reaffirming *Roe*, in this case.

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Respondent Shawn Lewis submits this brief in opposition to the Petition for a Writ of Certiorari filed by Gene Myers, guardian ad litem for the fetus, on September 30, 1988, as well as the Petition for a Writ of Certiorari filed by Carlton Lewis, Ms. Lewis' ex-husband, on October 21, 1988. Both Petitions seek review of the judgment entered by the Michigan Court of Appeals in this action.

COUNTERSTATEMENT OF JURISDICTION

The guardian ad litem does not have standing to bring this claim seeking to deprive Ms. Lewis of her constitutional right to choose to have an abortion; therefore his Petition must be denied. A guardian ad litem may have standing to raise some claims on behalf of a fetus, such as claims necessary to protect the property interests of a child that will be born.[1] This Court has made absolutely clear, however, that a fetus has no "right to life" and thus no basis for invoking the power of the state to interfere with a woman's decision to have an abortion. The Court has held unequivocally that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." *Roe v. Wade*, 410 U.S. 113, 158 (1973). This holding is consistent with case law even before *Roe* establishing that fetuses are not persons under the Constitution. *See Abele v. Markle*, 351 F. Supp. 224, 228 (D. Conn. 1972), *vacated and remanded on other grounds*, 410 U.S. 951 (1973); *Klein v. Nassau County Medical Center*, 347 F. Supp. 496 (E.D.N.Y. 1972) (three-judge court), *aff'd in part sub nom.* *Ryan v. Klein*, 412 U.S. 924 (1973) (appeal by intervenors asserting interests of fetuses), *vacated & remanded in part sub nom. Commissioner of Social Servs. v. Klein*, 412 U.S. 925 (1973) (appeal by state); *McGarvey v. Magee-Womens Hosp.*, 340 F. Supp. 751 (W.D. Pa.

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1 Although the Michigan law upon which the trial court relied permits the appointment of a guardian to protect the *property* interests of a "person not in being," Mich. Comp. Laws Ann. § 600.2045 (1) (West 1981), there is no provision in Michigan state law that would permit the appointment of a guardian ad litem for a fetus in the circumstances of this case. Myers App. 13a.

1972), *aff'd*, 474 F.2d 1339 (3rd Cir. 1973); *Byrn v. New York City Health & Hosps. Corp.*, 31 N.Y.2d 194, 286 N.E.2d 887 (1972), *appeal dismissed*, 410 U.S. 949 (1973); *see also Roe*, 410 U.S. at 157 ("[T]he appellee conceded on reargument that no case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment."). The lower federal courts have, of course, followed this Court's holding in *Roe*.[2]

Because a fetus is not a person under the Constitution, a guardian ad litem for the fetus obviously does not have standing to bring a claim.[3] "The law is clear that an unborn child is not a person under the Fourteenth Amendment of the United States Constitution and therefore the unborn child and persons acting in behalf of an unborn child may not assert the deprivation of any rights or privileges secured by the Amendment." *Poole v. Endsley*, 371 F. Supp. 1379, 1382-83 (N.D. Fla. 1974), *aff'd in part & remanded on other grounds*, 516 F.2d 898 (5th Cir. 1975) (citing *Roe v. Wade*); *see also Brady v. Doe*, 598 S.W.2d 338 (Tex. Civ. App. 1980), *cert. denied*, 449 U.S. 1081 (1981); *Rothenberger v. Doe*, 149 N.J. Super. 478, 374 A.2d 57 (1977).

Guardians ad litem for fetuses also have been denied standing to intervene and challenge a woman's right to choose abortion, even though the requirements of standing for purposes of intervention are more easily met than those for purposes of bringing a claim. *See Woe v. Bear*, No. H-79-1866 (S.D. Tex. May 5,

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2 *See, e.g., Ruiz Romero v. Gonzalez Caraballo*, 681 F. Supp. 123 (D.P.R. 1988); *Harman v. Daniels*, 525 F. Supp. 798 (W.D. Va. 1981), *Civic Awareness of Am., Ltd. v. Richardson*, 387 F. Supp. 1086 (E.D. Wis. 1975), *aff'd*, 532 F.2d 756 (7th Cir.), *cert. denied*, 429 U.S. 829 (1976); *Poole v. Endsley*, 371 F. Supp. 1379 (N.D. Fla. 1974), *aff'd in part & remanded on other grounds*, 516 F.2d 898 (5th Cir. 1975).

3 In order to have standing and satisfy the "case or controversy" requirement of Article III, a litigant must show that the interest sought to be protected by the complainant is arguably "within 'the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.' " *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 475 (1982) (quoting *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970)); *see also Allen v. Wright*, 468 U.S. 737, 751 (1984).

1980) (order denying motion to intervene) (subsequent history on merits omitted); *Roe v. Casey*, No. 78-2214 (E.D. Pa. Dec. 11, 1978) (order denying motion to intervene) (subsequent history on merits omitted); *Margaret S. v. Edwards*, No. 78-2765 (E.D. La. Oct. 2, 1978) (order denying motion to intervene) (subsequent history on merits omitted); *Akron Center for Reproductive Health v. City of Akron*, No. C78-155A (N.D. Ohio May 16, 1978) (order denying motion to intervene in relevant part) (subsequent history on merits omitted); *Zbaraz v. Quern*, No. 77-C-4522 (N.D. Ill. May 15, 1978) (order denying motion to intervene) (subsequent history on merits omitted); *Ryan v. Klein*, 412 U.S. 924 (1973);[4] *Doe v. Bolton*, 319 F. Supp. 1048, 1057 (N.D. Ga. 1970) (three-judge court), *modified*, 410 U.S. 179 (1973).

Because the guardian ad litem can only claim the interests of the fetus he purports to represent, and the fetus is not a person under the Fourteenth Amendment, the guardian ad litem lacks the requisite standing under Article III to bring this claim.

COUNTERSTATEMENT OF THE CASE

Respondent Shawn Lewis, a battered wife, divorced petitioner Carlton Lewis on October 24, 1988. Ms. Lewis filed her complaint for divorce on January 20, 1988 in the Genesee County Circuit Court before the Honorable Valdemar Washington. Ms. Lewis sought a divorce because Mr. Lewis physically abused her, refused to contribute, financially or otherwise, to the support of their household, and repeatedly

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4 In *Ryan*, intervenors purporting to represent embryos and fetuses, appealed the ruling of a three-judge court holding unconstitutional New York's refusal to fund legal abortions. In a separate appeal by the state, the Court vacated the district court order and remanded the case for reconsideration in light of *Roe v. Wade*. *Commissioner of Social Servs. v. Klein*, 412 U.S. 925 (1973). On the intervenor's appeal however, the Court summarily affirmed the district court, indicating its refusal to recognize claims of purported guardians ad litem in abortion cases.

abandoned Ms. Lewis and their infant son Christopher. *See* App. 3a-4a.[5]

Ms. Lewis' first pregnancy, with Christopher, her one child, was extremely difficult. She was continually ill, suffering from high blood pressure, high blood sugar and kidney infection (for which she was hospitalized for a week), and was confined to her bed for much of the last three months of the pregnancy. App. 2a. Mr. Lewis was furious that the pregnancy made her sick. As Ms. Lewis told the county court:

> Carl [Lewis] left three times during the pregnancy for about two weeks each time. Just before Christmas 1986 he left. He said that he couldn't handle it that I couldn't go anywhere or do anything and that I was constantly ill. He went and lived with his brother; and, at that time, he stated that he did not want the child that I was carrying. I went to his brother's house and begged him to come back.
>
> He left again the end of January or beginning of February 1987. We were fighting because he wanted to go to his cousin's home, someone I didn't approve of because he is a heavy drinker and Carl was influenced by this cousin. I wanted him to stay with me; but, he told me to get out of the car and dropped me off by the overpass at Court Street and Dort Highway. I walked home in the snow, 7 months pregnant, in cowboy boots and a light jacket. I got about three blocks from home after I had walked almost two miles when he sent a friend, Joe Stevens, to pick me up. When I got home, Carl had taken all of his things and moved to his brother's.

App. 2a-3a.

After Ms. Lewis gave birth to Christopher, Mr. Lewis became physically abusive. A police complaint described one assault:

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5 Citations to Mr. Myers' Petition For A Writ of Certiorari will be in the form "Myers Pet. ___" and those to Mr. Lewis' Petition will be in the form "Lewis Pet. ___." Citations to the appendix to Respondent's Brief In Opposition will be in the form "App. ___," those to Mr. Myers' appendix will be in the form "Myers App. ___" and those to Mr. Lewis' appendix will be in the form "Lewis App. ___."

> [Ms. Lewis] states that her husband who moved out a week ago came over and started a fight with [Ms. Lewis]. [Mr. Lewis] hit [Ms. Lewis] on boths [sic] arms and left side. [Mr. Lewis] then push [sic] [Ms. Lewis] threw [sic] the screen door. [Mr. Lewis] then left.

App. 8a. As a result of this physical abuse, the court issued a preliminary injunction on April 18, 1988 ordering Mr. Lewis to "desist and refrain from beating, assaulting, or in any way harassing or physically abusing [Ms. Lewis]." Preliminary Injunction Under MCR 3.310, MCR 3.203(c) And Public Acts 316-318 of 1978, No. 88-159036-DM, at 2 (Apr. 18, 1988). Mr. Lewis continued to leave home for extended periods of time.

> [W]hen Christopher was born in April, when he was 5 weeks old—about May 24th, which is around the time he beat me up (a copy of the police report is attached), he left again. At that time, I was undergoing heart testing because my father had just had open heart surgery for a diseased valve which was hereditary. In addition, I had an infection in my tubes from the pregnancy.
>
> . . . .
>
> When Carl left that time, he went to his mother's for at least two weeks. Each time he was gone, he was gone about two weeks—long enough to get a full paycheck and spend it on himself. Then he would come back.
>
> After he came back home, he didn't have a lot of patience with the baby. . . . He . . . would want to go out after he got home from work. I couldn't go out because I would have to get up at 6 o'clock in the morning and take care of the baby. We fought a lot about that.
>
> I never left Carl alone with Christopher very often. . . . One time when I let [sic] him with Christopher, he let Christopher fall off the couch and badly scratched his head.
>
> Things were better until he left again November 1, 1987. He took our son trick-or-treating the night before and I thought everything was okay. He left and went to his mother's house. The next day he called my parents and

> told them that he no longer could handle it, that he didn't want the responsibility of Christopher and me, and to find someone else to take care of us. On November 2nd, I went down and filed for ADC.
>
> At that time, the heat bill was at least 2 months behind, the water was to be turned off, and the phone had been turned [off] because the bills hadn't been paid in a couple of months. He spent the money on his dune buggy. I applied for emergency help for the water, emergency food stamps, and I had to borrow money from my parents for diapers, etc.

App. 3a-4a.

During the nine months since Ms. Lewis filed for divorce, Mr. Lewis has continually harassed her, often forcing Ms. Lewis to call the police. *See* App. 6a. Mr. Lewis has broken into her house on numerous occasions, destroyed her property, made threatening phone calls, and acted irresponsibly in caring for Christopher:

> Carl had a nervous breakdown near the end of February. He had broken into my house (police report attached). Dr. John Stoker treated him with antidepressants. He was hospitalized but I don't know for how long or where he was hospitalized. . . . I was concerned about allowing Carl to have Christopher for visitation because of the medication he was on and the alleged drug overdose of prescription pills and cutting his wrists.
>
> . . . .
>
> During that time there were more break-ins (police reports attached). On March 6, Carl had broken into the home. . . . It was his visitation weekend. He dropped Christopher off at a neighbor's house because he didn't want Christopher any more (copy of statement from neighbor is attached). I pulled in the driveway and Carl was sitting out in the street. He said, "Your precious little son is at one of the neighbors' houses."
>
> I went inside the house and called the police. Before they arrived, I wanted [sic] to three different houses to look for

> Christopher before I found him. I returned to the house and there was broken glass everywhere and the front screen was all bent and ripped. Once I got inside the house, I sat down with Christopher and waited for the police.
>
> While I was waiting, Carl returned and he was standing over me when Policeman Chris Blinkilde arrived. The officer asked me what was happening and he separated Carl and me. . . . At that point, Carl took a handful of pills out of his pocket and put them into his mouth in front of the officer. The officer handcuffed him, put him in the police car and took him downtown.
>
> . . . .
>
> Since then, the break-ins have continued and on July 1st, he refused to pay any additional child support. He didn't pay any support again until September, just before we went to court for the abortion issue.
>
> Since the Circuit Court hearing on the abortion issue, he has continuously harassed me, threatened me. I've had to leave my home because he wouldn't leave us alone. He would call at 1 o'clock in the morning, 5 o'clock in the morning. After I went to stay with my parents in Waterford, he still called long-distance to harass us.
>
> . . . .
>
> If he didn't call, he was there in the morning and at night. He would stand outside banging and screaming and yelling and pounding on the windows. The police were usually called. One weekend he did it and three police cars came.

App. 4a-6a.

Although the parties had not reconciled they engaged in sexual intercourse on one occasion, July 7, 1988, before the divorce was final. Ms. Lewis used a spermicide as a means of birth control.

On August 8, 1988, Mr. Lewis learned that Ms. Lewis was pregnant. That same day, he petitioned the court to force her to continue the pregnancy, and then give him full custody of any

child.[6] Judge Washington immediately issued a one-year injunction against any abortion, without notice to Ms. Lewis or her attorney. The court did not set a hearing at which Ms. Lewis could object to the injunction.

On August 17, Ms. Lewis requested that the injunction be dissolved. Judge Washington met in his chambers on August 19 with Mr. Steven Moss, counsel for Mr. Lewis. Ms. Linda Pylypiw, counsel for Ms. Lewis, was contacted only by telephone. Both petitioners seriously misrepresent the untranscribed telephone conference; they falsely assert that Ms. Pylypiw conceded that the medical judgment of Ms. Lewis' attending physician was that an abortion was not medically necessary to preserve Ms. Lewis' health. In fact, the trial court made no finding that Ms. Pylypiw made this concession, petitioners do not cite any evidence to support their assertion that she made this concession, and the record contains no such support. Ms. Pylypiw has enclosed in the appendix a declaration to point out these misrepresentations. *See* App. 20a.

Petitioners also rely on a statement by Dr. John Stoker which states "It is a social decision not a medical decision for a t.o.p. with this patient." *See* Lewis App. 20a. The record contains no evidence that Dr. Stoker was even Ms. Lewis' attending physician at that time. In fact, Dr. Stoker was *not* Ms. Lewis' attending physician—he had never even examined her in connection with this pregnancy. He was her physician in her first pregnancy with Christopher. Ms. Lewis has filed a complaint against Dr. Stoker with the Genesee County Osteopathic Medical Association, App. 16a, for misrepresenting his relationship with her, for violating the physician-patient privilege and for apparently signing conflicting letters—one that said an abortion was necessary to preserve Ms. Lewis' health, App. 19a, and one that says it was not, Myers App. 20a. Ms. Lewis has asked that the Medical Association order Dr. Stoker to correct what apparently was a fraud on the court.

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6 Mr. Lewis later petitioned the court to order Ms. Lewis to undergo an ultrasound. Petition For Order For Ultrasound Or Other More Accurate Determination of Length Of Pregnancy, No. 88-159036-DM (filed Sept. 2, 1988).

Despite Ms. Lewis' request for an immediate hearing, the court did not hold a hearing until September 6, one month after it enjoined Ms. Lewis from ending her pregnancy. The hearing was held in open court with the press and the public in attendance. At the hearing, Judge Washington acknowledged that the injunction cited improper statutory authority; he refused, however, to dissolve the injunction, and, in fact, issued a new preliminary injunction *nunc pro tunc* to August 9. The court did not rest its order on the "rights" asserted by Mr. Lewis, stating "I don't think that is the issue here." Myers App. 16a. Rather, the court applied the rights of minor children to a fetus. The court concluded that *Roe v. Wade* did not prohibit the enjoining of Ms. Lewis' abortion because "the United States Supreme Court was addressing the issue of the State regulation in the form of Statute and not addressing the issue as it related to a Common Law decision." Myers App. 15a. After issuing its opinion, the court appointed a guardian ad litem for the fetus for purposes of appeal; this was done sua sponte and without affording counsel an opportunity to object.

Ms. Lewis immediately appealed on September 7. The Michigan Court of Appeals granted emergency leave to appeal and on September 15 ordered that the injunction be dissolved as violative of Ms. Lewis' constitutional rights. The court, however, granted Mr. Lewis' request to stay its order until September 19. On September 15 the Michigan Supreme Court extended the stay until further order. On September 22 the Michigan Supreme Court denied the Application for Leave to Appeal filed jointly by Mr. Lewis and the guardian ad litem, but extended its stay until September 26 to allow an application for a stay to the United States Supreme Court.

Both Mr. Lewis and the guardian ad litem applied to Justice Antonin Scalia for a stay. Justice Scalia referred the matter to the full Court, which denied the application on September 26 without comment. Nos. A-240, A-244, mem. (U.S. Sept. 6, 1988) Thus, Ms. Lewis was barred by court order from exercising her right to have an abortion for a total of seven weeks, during which time she endured the severe mental strain of not knowing when, if ever, she would be "permitted" to end her unwanted pregnancy.

The day that the Michigan Court of Appeals upheld Ms. Lewis' constitutional rights, Mr. Lewis threatened to kidnap Christopher if she had terminated her pregnancy:

> On September 15, 1988, I was gone all day so I left the answering machine on. When my mother and I got home about 5 o'clock, there was a message from Carl; and, he said that if I had done what he thought I had done, he would take Christopher and I would never see him again and, "That's a promise."

App. 6a. Two days after the stay was dissolved, a warrant was issued for the arrest of Mr. Lewis on the charges of unlawful entry. On that date, Mr. Lewis kicked down the steel door to Ms. Lewis' house, which she had dead-bolted, and entered her home accusing Ms. Lewis of "killing his baby." *See* App. 14a. A friend managed to keep Mr. Lewis from approaching Ms. Lewis, who managed to call the police. Mr. Lewis' attorney, Steven Moss, was quoted as saying of the incident "I don't know what I would do if that was me. I might beat the hell out of her." *Id.*

As part of the Judgment of Divorce, issued October 24, 1988, the court issued a permanent injunction, to remain in effect until April 9, 2005, ordering Mr. Lewis to desist and refrain from "assaulting, beating, molesting or wounding" Ms. Lewis or entering onto her premises. Mr. Lewis was granted the right to only supervised visitation with his son Christopher.

REASONS WHY THE PETITIONS SHOULD BE DENIED

The Petitions should be denied because they fail to establish any of the factors that weigh in favor of review on a writ of certiorari: This Court's prior decisions are dispositive, the Michigan Court of Appeals properly applied those decisions, and no conflict exists among state or federal appellate courts as to the proper disposition of petitioners' claims. *See* Sup. Ct. R. 17. In attempting to argue to the contrary, petitioners misrepresent the facts of this case and grossly distort this Court's decisions upholding reproductive freedom and the right to privacy. As

every appellate court has recognized, *Roe v. Wade* and its progeny clearly protect the right of every adult woman, including respondent, to choose to terminate her pregnancy prior to viability.

I. THIS COURT'S PRIOR DECISIONS UPHOLDING WOMEN'S REPRODUCTIVE FREEDOM ARE DISPOSITIVE AND WERE PROPERLY APPLIED BY THE MICHIGAN COURT OF APPEALS.

A. A Woman's Constitutional Right To Decide Whether To Terminate Her Pregnancy Is Not Contingent Upon A Showing That The Abortion Is Medically Necessary

The Michigan Court of Appeals properly dissolved the trial court's injunction, finding that "the injunction interferes with plaintiff's constitutional rights as set forth by the United States Supreme court in *Roe v. Wade* and *Planned Parenthood of Central Missouri v. Danforth*." App. 3a (citations omitted).

Petitioners seek review of the Michigan Court of Appeals' decision on the entirely frivolous ground that "the [privacy] right extends only to abortions which are medically necessary for the well-being of the mother in the sound medical judgment of the attending physician."[7] Myers Pet. at 10; *see also* Lewis Pet. at 10. This distortion of the liberty-based privacy right is directly contradicted by this Court's decisions.

In *Roe v. Wade*, 410 U.S. 113 (1973), the United States Supreme Court held that a woman has a constitutional right to decide whether to have an abortion: The "right of privacy . . . founded in the Fourteenth Amendment's concept of personal

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7 Petitioners are not clear about how they would define medical necessity. This Court has construed the concept of necessity very broadly in *Doe v. Bolton*, 410 U.S. 179, 192 (1973), as including "all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient." The note from Dr. Stoker relied on by petitioners, however, did not purport to consider all of these factors. In any event, petitioners' interpretation would allow the opinion of a single physician to defeat a woman's right to choose abortion and apparently would impose on a woman "an initial evidentiary burden" to establish that an abortion was medically necessary. Myers Pet. 18. This interpretation in clearly incorrect.

liberty and restrictions upon state action . . . is broad enough to encompass a *woman's* decision whether or not to terminate her pregnancy." *Id.* at 153 (emphasis added). Since *Roe* the Court has consistently and unequivocally reaffirmed the right in numerous decisions. *See, e.g., Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986); *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976). Thus, as the Michigan Court of Appeals found, this Court's decisions in *Roe* and its progeny are dispositive.

Even a cursory reading of *Roe* makes absolutely clear the absurdity of petitioners' claim that a woman has no right to choose to have an abortion unless she demonstrates that an abortion is necessary to preserve some narrow definition of her health. In *Roe* this Court catalogued some of the severe physical, emotional and life-altering harms that the state would inflict on a woman by forcing her to bear an unwanted child:

> Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.

410 U.S. at 153. Justice Douglas in his concurrence elaborated on the ways in which an involuntary pregnancy and childbirth would require a woman "to endure the discomforts of pregnancy; to incur the pain, higher mortality rate, and aftereffects of childbirth; to abandon educational plans; to sustain loss of income; to forego the satisfactions of careers; to tax further mental and physical health in providing child care." *Id.* at 214-15. Depriving a woman of her right to control her body would rob her of her ability to shape her own life and pursue her chosen goals and dreams. In addition to these considerations which

may go beyond ones considered purely "medical," the Court in *Roe* implicitly recognized that there would always be a sufficient medical indication for abortion in the first trimester: that it is always safer than continued childbirth and pregnancy.[8]

Petitioners misleadingly string together quotations taken out of context from this Court's decisions that refer to a woman's "attending physician" and the physician's "medical judgment." Petitioners argue that because the Court has acknowledged that "medical judgment" is involved in the abortion decision, only some undefined but narrow class of medically necessary abortions is protected. This reasoning is absurd. Certainly, an abortion is a medical procedure requiring "medical judgment," as does any medical treatment. Thus, the Court's references are not surprising. This in no way means, however, that a woman's right to choose to have an abortion is contingent on a physician's determination that continuing a pregnancy would endanger the woman's health. Rather, the Court's references to the physicians' involvement is aimed at ensuring that a woman's decision to terminate her pregnancy is effectuated by "medically competent personnel." *Connecticut v. Menillo*, 423 U.S. 9, 11 (1975).

If petitioners were correct, a single physician who is personally opposed to all abortions would have the power to deny a woman her right to choose to have an abortion by stating it was not medically necessary. This indefensible interpretation is in direct conflict with this Court's statement that the role of a physician in a woman's abortion decision, as in any medical decision, is to use his or her medical training to assist the woman in making an informed choice:

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8 Abortion, particularly early abortion, is safer than continued pregnancy and child birth. In terms of mortality, "abortion through the 15th week of pregnancy is at least tenfold safer than childbearing." Cates, Smith, Rochat & Grimes, *Mortality From Abortion and Childbirth, Are the Statistics Biased*, 248 J. A.M.A. 192, 196 (1982). "Moreover, the risk of death from legal induced abortion is no higher at any point in gestation than is the risk of death from childbearing." Tietze & Henshaw, *Induced Abortion: A World Review* 110 (1986) (The Alan Guttmacher Institute). Finally, "[e]xamination of the data on which mortality rates for legally induced abortion and childbearing are calculated indicates the comparisons overestimate the abortion risks." Cates, *supra*, at 196.

> The Court also has recognized, because abortion is a medical procedure, that the full vindication of *the woman's fundamental right* necessarily requires that her physician be given "the room he needs to make his best medical judgment." *Doe v. Bolton*, *Roe*, 410 U.S. 179 (1973). See *Whalen v. Roe*, 429 U.S. 589 (1977). The physician's exercise of this medical judgment encompasses both assisting the woman in the decisionmaking process and implementing *her* decision should *she* choose abortion.

City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 427 (1983) (emphasis added).[9]

Finding that "the rights of the pregnant woman" to make the abortion decision are fundamental, the Court held that a state may interfere with that decision only to the extent necessary to further "compelling" interests asserted by the state. *Roe*, 410 U.S. at 162-63. Contrary to petitioners' complete distortion of *Roe*, the Court further held that the state may require a showing of medical necessity *only* if the state has a compelling interest supporting that restriction; this occurs at viability when the state's interest in the potentiality of the fetus becomes compelling. *Id.* at 163-64 (after viability, state may "go so far as to proscribe abortion . . . except when it is necessary to preserve the life or health of the mother").

Petitioners have not even attempted to argue (nor could they) that there existed a compelling state interest sufficient to justify depriving Ms. Lewis of her constitutional right to choose to have an abortion. Thus, petitioners' requests for a writ of certiorari must be rejected.

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9 Similarly, as this Court stated:

> Nothing in [*Doe v. Bolton*, 410 U.S. 179 (1973)] suggests that a doctor's right to administer medical care has any greater strength than his patient's right to receive such care. The constitutional right vindicated in *Doe* was the right of a *pregnant woman* to decide whether or not to bear a child without unwarranted state interference. The statutory restrictions on the abortion procedures were invalid because they encumbered the woman's exercise of that constitutionally protected right by placing obstacles in the path of the doctor upon whom she was entitled to rely for advice in connection with her decision.

Whalen v. Roe, 429 U.S. 589, 604 n. 33 (1977) (emphasis added).

II. PETITIONERS' "QUESTIONS PRESENTED" ARE NOT PROPERLY RAISED BY THE FACTS OF THIS CASE BECAUSE NO DETERMINATION WAS MADE BY MS. LEWIS' ATTENDING PHYSICIAN THAT AN ABORTION WAS NOT MEDICALLY NECESSARY

Petitioners contend that this case presents the question whether the right to privacy protects the decision to have an abortion where the woman's attending physician has determined that the abortion is not necessary for the woman's well-being. That question is not presented by this case. Petitioners rely on what they describe as a "concession" by counsel for Ms. Lewis and a one-sentence note apparently written by Dr. John Stoker which states "It is a social decision not a medical decision for a t.o.p. with this patient." Myers App. 20a. Petitioner Myers admitted that "[t]his concession by counsel for [Ms. Lewis] is the hinge on which this case turns." Myers App. 18a. However, Ms. Linda Pylypiw, trial counsel for Ms. Lewis, never conceded that an abortion was not medically necessary, and Dr. Stoker was not Ms. Lewis' attending physician in connection with this pregnancy. App. 21a. The record contains no support for petitioners' assertions to the contrary, the trial court made no such findings, and any such findings would be clearly erroneous.

Dr. Stoker was Ms. Lewis' physician in her first pregnancy. Dr. Stoker never physically examined her in connection with this second pregnancy. Despite his lack of information upon which to make a medical determination, Dr. Stoker apparently wrote two conflicting statements about medical indications for Ms. Lewis' abortion. In addition to the note to Mr. Lewis, Dr. Stoker wrote a second contradictory note stating that an abortion was medically necessary to preserve Ms. Lewis' health. "Shawn Lewis had a difficult time with her first pregnancy on the date of 04/09/87 and she cannot handle the stress at this time." App. 19a.

It has not yet been determined why Dr. Stoker wrote these conflicting notes without a proper medical evaluation or examination and why he released confidential information without Ms. Lewis' consent. The Genesee County Osteopathic Medical

Association is currently considering a complaint filed by Ms. Lewis against Dr. Stoker for his unprofessional, unethical and possibly illegal behavior in this matter. Ms. Lewis is requesting that Dr. Stoker be ordered to retract his statements and correct his misrepresentations to the state courts and to this Court.

III. AS THIS COURT'S DECISIONS MAKE CLEAR, THE DECISION OF THE MICHIGAN COURT OF APPEALS DOES NOT CONFLICT WITH ANY COMPELLING INTEREST ASSERTED BY THE STATE OF MICHIGAN OR ANY FEDERAL RIGHT ASSERTED BY PETITIONERS.

Petitioners' failure to assert a compelling state interest is fatal because a compelling interest is essential to justify any state interference with Ms. Lewis' abortion decision. Petitioners make only the legally insufficient claim that the state and Mr. Lewis have legitimate interests that weigh against Ms. Lewis' having an abortion. Even this extremely limited claim proves false: No Michigan statute purports to protect the interests petitioners assert; the state of Michigan has taken no part in this case; and petitioners possess no federal rights that are implicated by Ms. Lewis' decision to have an abortion. Even if petitioners had asserted legitimate interests, those interests could not defeat Ms. Lewis' constitutional rights. Moreover, if petitioners had applied the correct legal standard, they could not have established the existence of a compelling state interest to justify forcing Ms. Lewis to continue her pregnancy and to give birth against her will.

A. A Man Does Not Have A Constitutional Right To Interfere With A Woman's Decision To Have An Abortion.

In 1976 this Court decided the precise issue presented here; the Court unequivocally declared that a woman's right to end an unwanted pregnancy may not be infringed on the basis of her husband's objections. *See Danforth*, 428 U.S. at 69-71. The Court struck down a Missouri law that prohibited a married

woman from having an abortion without her husband's consent. *Id.*

Mr. Lewis argues that *Danforth* is not dispositive because it involved a state statute giving all men the right to veto their wives' abortion decisions, whereas Mr. Lewis "seeks a judicial consideration of competing rights and interests, based on the facts of each case." Lewis Pet. 8. This suggested distinction is insignificant. As the Court recognized in *Danforth*, "The obvious fact is that when the wife and the husband disagree on this decision, the view of only one of the two marriage partners can prevail." *Id.* at 71. Mr. Lewis quite definitely seeks the creation of a right that would allow a man to use the courts to veto a woman's decision to have an abortion. Whether imposed by court order on a case-by-case basis or by state statute, the deprivation of a woman's constitutional right is equally complete and the harm resulting from a court-ordered pregnancy and childbirth equally devastating.

Moreover, this Court has already done the balancing of interests sought by Mr. Lewis. The Court in *Danforth* expressly considered "the deep and proper concern and interest that a devoted and protective husband has in his wife's pregnancy and in the growth and development of the fetus she is carrying." *Id.* at 69. Nevertheless, the Court concluded that a woman's right to make the abortion decision outweighs her husband's interests in each and every case: "Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, *the balance weighs in her favor.*" *Id.* at 71 (emphasis added).

Roe and its progeny make clear that a case-by-case judicial inquiry into a woman's abortion decision would itself be unconstitutional. *Cf. Thornburgh*, 476 U.S. at 766 (quoting *Bellotti v. Baird*, 443 U.S. 622, 655 (1979) (Stevens, J., concurring)) ("It is inherent in the right to make the abortion decision that the right may be exercised without public scrutiny and in defiance of the contrary opinion of the sovereign or other third parties."); *Doe v. Bolton*, 410 U.S. at 195-98 (abortion decision may not be subject to *ad hoc* determinations of hospital committee). An individual woman's personal circumstances are legally irrelevant. Recognizing the unparalleled importance of a

woman's right to control her reproductive capabilities, the Court has declared that every adult woman has the right to decide to have an abortion and to effectuate that decision without government interference, regardless of her very personal reasons and without having to reveal those reasons.[10]

1. The Fourteenth Amendment Affords Individuals Protection Only From State Action And Does Not Apply to Wholly Private Acts Such As A Woman's Choosing An Abortion.

Even absent *Danforth* and the Court's other dispositive abortion cases Mr. Lewis could not prevail. His assertion that Ms. Lewis' abortion decision implicates his constitutional rights is frivolous. The federal constitutional rights cited by Mr.

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10 Faced with having to explain to a court their reasons for choosing abortion and having to expose intimate details of their lives to judicial and public scrutiny, some women would instead resort to unsafe, illegal abortions, despite the great risks to their health and lives. Although a private abortion is a legal and constitutionally protected choice, some women nevertheless have illegal abortions. A study of the seventeen deaths following illegal abortions reported in the United States between 1975 and 1979 revealed that "[a] desire for secrecy was the primary reason four women sought illegal abortions and was a secondary factor for five others." Binkin, Gold & Cates, *Illegal Abortion Deaths in the United States: Why Are They Still Occurring?*, 14 Family Planning Perspectives 163, 165 (May/June 1982). Given that nine of seventeen women lost their lives due to a desire to keep their abortions secret during a time when their privacy was protected, that number inevitably would be far greater if Mr. Lewis' "case-by-case" review were lawful.

Moreover, the purely voluntary role that men play in women's abortion decisions would likely be hurt under Mr. Lewis' approach. The vast majority of women who have abortions inform the man involved. Plutzer & Ryan, *Notifying Husbands About An Abortion: An Empirical Look at Constitutional and Policy Dilemmas*, 71 Sociology and Social Research 183 (Apr. 1987). A study of 2,337 women seeking abortions at a clinic in St. Louis, Missouri revealed that 89.5% of the women had told the man involved about the pregnancy, and 92.8% of the married women had told their husbands. *Id.* at 185. If a man had the right to seek a court order prohibiting a woman from obtaining an abortion, a woman considering abortion would be discouraged from telling the man involved. The result could be that far fewer men would have any opportunity at all to be involved in women's abortion decisions.

Lewis—the right to procreate, rights derived from a marital relationship, and the right to raise one's children—protect a person only from *governmental* action and not the wholly private acts of individuals.[11] *Every* case cited by Mr. Lewis as support for his constitutional claims involves government action affirmatively interfering with the autonomy of private individuals.[12] This is not such a case.

For example, the Constitution certainly protects Mr. Lewis' right to be free from government intrusion in his decision to have a child. But it is up to Mr. Lewis, not lower court judges, to find a woman who will have a child with him. No individual, male or female, has a constitutional right to have a court compel another to procreate with him or her. To the contrary, the Constitution guarantees that the government will not interfere with the reproductive choices made by any individual.

Justice Stevens noted this fundamental flaw in Mr. Lewis' claim when he denied an application for an injunction in a legally and factually similar case, *John Doe v. Jane Smith*, 108 S. Ct. 2136 (1988). Justice Stevens wrote "I have serious doubts concerning the availability of a federal remedy for this claim in view of the fact that Jane Smith's decision to obtain an abortion can be carried out without any action on the part of the

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11 "The first section of the 14th Amendment . . . is prohibitory in its character, and prohibitory upon the States. . . . It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the Amendment." *Civil Rights Cases*, 109 U.S. 3, 9-12 (1883); *see also Rendell-Baker v. Kohn*, 457 U.S. 830, 837 (1982).

12 *See Rivera v. Minnich*, 107 S. Ct. 3001 (1987) (*state* may use preponderance of evidence standard in paternity proceeding); *Santosky v. Kramer*, 455 U.S. 745 (1982) (*state* may not sever parental rights absent clear and convincing evidence of grounds for termination); *Caban v. Mohammed*, 441 U.S. 380 (1979) (*state* may not practice sex discrimination in adoption proceedings); *Stanley v. Illinois*, 405 U.S. 645 (1972) (*state* may not sever parental rights based on father's unmarried status); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (*state* may not prohibit sale of contraceptives to married individuals); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (*state* may restrict public sale of merchandise by minors, including sale of religious publications); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (*state* may not sterilize persons convicted of crimes).

State of Indiana or any other state governmental subdivision." *Id.* at 2137.

The constitutional rights asserted by Mr. Lewis act only as "a shield for the private citizen against government action, not a sword of government assistance to enable him to overturn the private decisions of his fellow citizens." *Doe v. Doe*, 365 Mass. 556, 314 N.E.2d 128, 132 (1974). The court in *Doe* rejected a request by a man to enjoin his wife's abortion, concluding "[w]e find no basis for the husband's assertion that the Constitution enables him to summon the Commonwealth to help him in a dispute with his wife." *Id.* Mr. Lewis improperly seeks to twist constitutional shields designed to protect individuals from government intrusion, into swords of government coercion in the form of judicial action to subordinate women to the wills of their husbands.

a. Right To Procreate

The implications of Mr. Lewis' distortion of the right to procreate are staggering: In effect he claims that the right to procreate entitles a man to invoke the power of the government to compel a woman to bear his child. If he is correct, courts could order unwilling individuals to engage in uncontracepted sex with spouses or lovers desirous of having children. Or, an individual whose sexual partner did not wish to have a child could be compelled to use contraception during sex. The Supreme Judicial Court of Massachusetts outlined the insidious implications of judicial intervention in refusing to issue an injunction similar to the one requested by Mr. Lewis:

> [W]e would not order either a husband or a wife to do what is necessary to conceive a child or to prevent contraception, any more than we would order either party to do what is necessary to make the other happy. We think the same considerations prevent us from forbidding the wife to do what is necessary to bring about or prevent birth . . . . Some things must be left to private agreement.

Doe v. Doe, 365 Mass. 556, 314 N.E.2d 128, 132 (1974).

Given the constitutional right not to procreate, a man who did not want a child would even have the right to seek a court order forcing a woman to submit to an unwanted abortion:

> If we were to conclude that a putative father has the standing to *prevent* the natural mother from terminating the pregnancy would the putative father have the corresponding standing to *compel* the termination of the pregnancy . . . ? Could a potential putative father (or for that matter a husband) seek an injunction to restrain the woman from using contraceptives or compel the woman to bear children? Such circumstances would seem ludicrous . . . and it would be beyond the province of logic and reason to suggest that she could be compelled to procreate.

Jones v. Smith, 278 So.2d 339, 344 (Fla. App. 1973) (emphasis in original) (court refused to enjoin woman from having abortion opposed by man claiming responsibility for pregnancy, despite man's expressed desire to marry woman and assume responsibility for child), *cert. denied*, 415 U.S. 958 (1974). If Mr. Lewis' flawed analysis were accepted the federal courts would be faced with the impossible task of resolving countless disputes involving abortion, sterilization, and the use of birth control, between spouses and lovers unable to agree about whether to have a child.

b. Rights Derived From Marriage

Mr. Lewis asserts that "his status as a husband in the family unit" confers upon him a "marital right of privacy." Lewis Pet. 13. Mr. Lewis seems to be arguing that the privacy right inheres in the marital couple, rather than in the husband and wife as individuals. This view was rejected in *Danforth* and also runs counter to the basic principle that the privacy right protects individuals only from *government* action. Moreover, in *Eisenstadt v. Baird*, the Court expressly rejected the notion that the marital couple is a separate independent entity, and instead recognized marriage as "an association of two individuals each with separate intellectual and emotional makeup." 405 U.S. 438, 453 (1972) (unmarried individuals have constitutional right

to use contraceptives); *see also Carey v. Population Servs. Int'l*, 431 U.S. 678, 687 (1977) ("*Griswold* may no longer be read as holding only that a State may not prohibit a married couple's use of contraceptives. Read in light of its progeny, the teaching of *Griswold* is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State.").

Mr. Lewis' assertion of rights "inherent in his status as a husband," Pet. 13, amount to a claim that a man has the right to use the power of the state to subjugate his wife's will to his own. This outdated view of the marital relationship is inconsistent with this Court's condemnation of our country's "long and unfortunate history of sex discrimination." *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973); *see also Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724-25 (1982). Since 1973, the Supreme Court has recognized that unimpeded access to safe legal abortion services is essential to women's capacity to live as free, equal and autonomous citizens. *See Roe*, 410 U.S. 113. Most recently, the Court reiterated this principle in *Thornburgh*:

> Our cases long have recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond reach of government . . . *That promise extends to women as well as to men.* Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision . . . whether to end her pregnancy. A woman's right to make that choice freely is fundamental. Any other result, in our view, would protect inadequately a central part of the sphere of liberty *that our law guarantees equally to all.*

476 U.S. at 772 (citations omitted; emphasis added). Stripping women of control of their reproductive capacity, and giving that control to their husbands, would condemn women to a continued existence as unequal and subordinate members of our society.

c. The Right To Raise One's Children

Mr. Lewis' reliance on the constitutional right of fathers to "the care, custody, control, and companionship of his children," Pet. 12, is entirely irrelevant to Ms. Lewis' decision to have an abortion. Certainly, fathers as well as mothers have constitutional rights (again, assertable only against government action) vis-a-vis their children. Yet those rights are not in any way implicated here because this case involves neither a child nor a father. Rather, the issue here is whether a man can force a woman to bear a child and become a mother against her wishes in order to satisfy his desire to have a child.

Mr. Lewis' alleged "paternal rights" are based on a theory that human life begins at conception, so that a fetus is a "child" and a man who has fertilized a woman's ovum is a "father." Yet the Court in *Roe* rejected precisely this effort to enshrine a particular theory of life as state law. *See Roe v. Wade*, 410 U.S. at 159-62; *see also Akron*, 462 U.S. at 444 ("a State may not adopt one theory of when life begins to justify its regulation of abortions"). The state of Michigan has not adopted as law Mr. Lewis' theory of when life begins, but even if it had, such a law would plainly be unconstitutional and thus unavailable to Mr. Lewis to support his claims.

B. The State of Michigan Has Not Asserted A Compelling Interest In Fetal Life In Order To Deprive Women Of Their Right To Choose Abortion.

The trial court treated this case as a controversy about the rights of a child whose parents are involved in a divorce proceeding, and found its legal authority for issuing the injunction prohibiting Ms. Lewis from terminating her pregnancy in the Child Custody Act of 1970 and the state divorce statute provisions for the care, custody, and support of minor children.[13] Declaring that "there is a wide open view as to what constitutes

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13 The court also relied on Michigan Rules of Court, Rule 3.204(a)(4) requiring that a complaint for divorce contain information "that the female party is pregnant, if she is." Myers App. 10a. The trial court erroneously

a child," the court made a radical departure from judicial precedent, and defined the term to include all fetuses.[14] Myers App. 16a. The court, blatantly disregarding this Court's precedent, then granted the fetus an absolute right to be born, holding, in effect, that by participating in a divorce proceeding, a woman waives her constitutional right to terminate her pregnancy.

The only precedent the court cited for this proposition, *Tyler v. Tyler*, 348 Mich. 169, 82 N.W.2d 448 (1957), held that a court could re-open a divorce decree to provide for the maintenance and support of a child conceived during marriage, but not yet born at the time of the divorce. *Id.* at 172. The court was protecting a property interest that was contingent upon the birth of a child, an interest that is entirely consistent with upholding a woman's right to choose abortion.[15] When the court issued the injunction prohibiting Ms. Lewis from terminating her pregnancy, it was not exercising its jurisdiction over a minor child, nor was it protecting the property rights of a future child; it was seeking to force a pregnant woman to bear a child against her will.

Mr. Myers, in his petition for certiorari, completely abandons the trial court's analysis and supplies an alternative, though equally flawed, legal theory. He argues that the trial court's injunction is supported by two state interests: (1) the

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assumed that this requirement anticipates the court's intervention in the woman's pregnancy. Myers App. 16a-17a. In fact, such information is relevant to a divorce proceeding only because it is the duty of the court to ensure that a child born subsequent to the dissolution is provided for in terms of support, maintenance, and custody.

14 Nowhere in the definition section of the Child Custody Act of 1970, Mich. Comp. Laws Ann. § 722.22(2)(a) (West Supp. 1988) is a fetus included in the definition of a minor child. In fact, the very nature of the factors that a court must consider under the Child Custody Act, when applied to a fetus, demonstrate that a fetus was not within the contemplation of the drafters of the legislation. *Id.* § 722.23. Moreover, a court is precluded from defining all fetuses, and particularly those in the first trimester of development, as children.

15 The property right was contingent upon live birth, for if the child were not born alive, no right to support would accrue. *See Toth v. Goree*, 65 Mich. App. 296, 237 N.W.2d 297, 305 (1975) (Maher, J., dissenting).

state of Michigan's interest in protecting fetal life; and (2) Michigan's public policy of encouraging childbirth over abortion.

Mr. Myers' arguments must fail because, as this Court has held, whatever interest the state of Michigan has recognized in fetal life, this interest does not justify interfering with a woman's right to life and liberty, including her fundamental right to terminate a pregnancy prior to viability. In *Roe v. Wade* this Court stated quite clearly that "we do not agree that, by adopting one theory of life, [a state] may override the rights of the pregnant woman that are at stake." 410 U.S. at 162.

In addition, the state of Michigan has not asserted any interest in the fetus that is implicated by this case. No Michigan statute seeks to prohibit first trimester abortions and the state has taken no part in this case. Yet Mr. Myers argues that Michigan has asserted an interest in protecting fetal life at the expense of the rights of a woman who chooses to have an abortion. Mr. Myers relies on a case that held the estate of an eight-month-old viable fetus was eligible to recover under the state's wrongful death statute. *O'Neil v. Morse*, 385 Mich. 130, 188 N.W.2d 785 (1971). This reliance on *O'Neil* is both misleading and duplicitous. Permitting recovery for the wrongful death of a fetus does not conflict with the rights of the pregnant woman; rather, it protects the woman's interests by compensating her for the loss of her expected child.[16] Moreover, Ms. Lewis was in her first trimester of pregnancy and the Michigan Supreme Court has unequivocally held that a nonviable fetus is not a "person" within the wrongful death act. *Toth v. Goree*, 65 Mich. App. 296, 237 N.W.2d 297, 302 (1975). Mr. Myers cites this case in his petition but does not disclose its holding. Myers Pet. at 23, n.12.

Mr. Myers also inaccurately claims that Michigan has adopted a public policy of preferring childbirth over abortion

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16 This Court addressed the subject of fetal status under wrongful death statutes in *Roe*: "In a recent development, generally opposed by the commentators, some States permit the parents of a stillborn child to maintain an action for wrongful death because of prenatal injuries. Such an action, however, would appear to be one to vindicate the parents' interest and is thus consistent with the view that the fetus, at most, represents only the potentiality of life." 410 U.S. at 162 (footnote omitted).

through the recent passage of a statutory amendment proscribing the use of public funds to finance abortions.[17] Even if this were true, it would in no way imply that the state had expressed an interest in ensuring that fetuses are born at the expense of a woman's constitutional right to choose abortion. In fact, this Court expressly held that declining to fund abortion is entirely distinct from prohibiting abortion. *See Harris v. McRae*, 448 U.S. 297, 316 (1980); *Maher v. Roe*, 432 U.S. 464 (1977).

The state has a compelling interest in preserving and protecting the lives and health of pregnant women and protecting the constitutional rights of its citizens. *See Roe*, 410 U.S. at 162. There is no reason to assume that a state would seek to promote fetal interests where the very rights to life and liberty, including the right to terminate an unwanted pregnancy, were threatened.

IV. THE MICHIGAN COURT OF APPEALS DECISION IS CONSISTENT WITH THE DECISIONS OF EVERY APPELLATE COURT TO CONSIDER THE ISSUE

Mr. Lewis alludes to the fact that since 1973 there have been "well over two hundred and fifty abortion cases in lower federal courts." Lewis Pet. 17. Yet neither petitioner cites a single case by any court, federal or state, appellate or trial, to support their frivolous argument that this Court's decisions hold that only certain, undefined abortions are constitutionally protected. To respondent's knowledge, no court has ever adopted this distorted interpretation of *Roe* and its progeny. To the contrary, courts have uniformly recognized the right of every adult woman to decide to have an abortion.

Moreover, every appellate court to consider the issue has held that a man does not have the right to a court order enjoining a woman from exercising her abortion right. This has been true in cases both where the man seeking the court order was the

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17 Michigan has provided, and is currently providing, public funds for abortion. In 1987 the state legislature approved a bill banning Medicaid-paid elective abortions. However, the law was almost immediately suspended by the filing of petitions demanding a voter referendum. Letter from Attorney General Frank Kelly to Social Services Director C. Patrick Babcock (Mar. 28, 1988). Voters will decide whether the new law will go into effect during the general election in November, 1988.

woman's husband, *Conn v. Conn*, 526 N.E.2d 958 (Ind. 1988), *applications for stay denied*, No. A-88-55 (U.S. July 22, 1988) (letter from the Clerk of the Court), *petition for cert. filed*, 57 U.S.L.W. 3186 (U.S. Sept. 23, 1988) (No. 88-347); *Coleman v. Coleman*, 57 Md. App. 755, 471 A.2d 1115 (1984); *Doe v. Doe*, 365 Mass. 556, 314 N.E.2d 128 (1974), as well as where the man was not the woman's husband but claimed to be responsible for the woman's pregnancy, *John Doe v. Jane Smith*, 527 N.E.2d 177 (Ind. 1988), *applications for stay denied*, 108 S. Ct. 2136 (1988) (Stevens, J., in chambers), No. A-88-55 (U.S. July 22, 1988) (White, J.) (letter from Clerk of the Court); *Jane Doe v. John Smith*, No. 84A01-8804-CV-00112, slip op. (Ind. Ct. App. Oct. 24, 1988); *Jones v. Smith*, 278 So.2d 339 (Fla. App. 1973), *cert. denied*, 415 U.S. 958 (1974). *See also Przybyla v. Przybyla*, 87 Wis.2d 441, 275 N.W.2d 112 (Wis. Ct. App. 1978) (woman's exercise of right to terminate her pregnancy without consent of husband cannot support recovery by husband for intentional infliction of emotional distress). Courts consistently denied such requests even prior to *Danforth*:

> "[*Roe v. Wade*, 410 U.S. 113 (1973) and *Doe v. Bolton*, 410 U.S. 179 (1973)] make crystalline . . . that a woman in the first trimester of pregnancy, in consultation with her physician, may elect to terminate the pregnancy, and neither the state nor the woman's spouse nor the father of the child has any right to intervene so as to prevent her decision from becoming fact."

Coleman, 471 A.2d at 1119; *see also Doe*, 314 N.E.2d 128; *Jones*, 278 So. 2d 339.

V. NO REASON EXISTS FOR THIS COURT TO TAKE THE EXTRAORDINARY STEP OF RECONSIDERING ITS WELL-ESTABLISHED AND UNBROKEN PRECEDENT RECOGNIZING A WOMAN'S RIGHT TO END AN UNWANTED PREGNANCY.

Petitioners' arguments are so wholly without merit that petitioners are left to argue that this Court should reconsider its decision in *Roe v. Wade*, 410 U.S. 113. This request, which

would be extraordinary in any case, is ludicrous here because petitioners would not prevail even if a woman's right to choose abortion were not constitutionally protected. As explained above, the state of Michigan has not asserted any interest in stopping Ms. Lewis from obtaining an abortion, nor have petitioners established any state action interfering with any rights of Mr. Lewis.

There is no valid reason to ignore the principle of *stare decisis* by reconsidering *Roe*. Petitioners' arguments require overruling, not merely "reconsidering," *Roe* as well as fifteen years of Supreme Court precedent reaffirming a woman's constitutional right to choose abortion. Overruling *Roe* and its progeny would also cast serious doubt on a long series of landmark Supreme Court rulings recognizing the right to privacy that spans back at least to 1923. As the Court made clear, *Roe* was a natural outgrowth of a gradual process of evolution involving the recognition of our basic liberties including the liberty to decide for ourselves when and whether to marry, *see Loving v. Virginia*, 388 U.S. 1 (1967), how to raise and educate our children, *see Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and how much of our most personal lives to disclose to the world, *see Katz v. United States*, 389 U.S. 347 (1967), as well as the right to decide whether to conceive or bear children, *see Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Griswold v. Connecticut*, 381 U.S. 479 (1965).[18]

In support of their request, petitioners offer a variety of arguments, all founded on the premise that we know more now about abortion than we did in 1973 and that the purported "advances" in legal scholarship, scientific knowledge, and understanding of the social implications of abortion since then justify rejecting *Roe*.

The petitioners' premise is false. Henry Wade, District Attorney of Dallas County in 1973, argued extensively in his brief in *Roe* that "modern science—embryology, fetology, genetics,

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18 The Court noted in *Roe*, 410 U.S. at 152, that it had recognized the right to privacy as far back as 1891. *See Union Pac. Ry. v. Botsford*, 141 U.S. 250, 251 (1891). The Court wrote in *Botsford* that "[n]o right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person."

perinatology, all of biology—establishes the humanity of the unborn child." Brief for Appellee at 31, *Roe*, 410 U.S. 113. The brief cited literally dozens of scientific articles and included photographs of fetuses at forty days, six weeks, nine weeks, ten weeks, twelve weeks, sixteen weeks, seventeen weeks, and eighteen weeks. *Id.* at 35-51.[19] In addition, Wade cited extensive caselaw in support of his claim that the fetus should be treated as a "person" under the law. This Court carefully considered and deliberately rejected these arguments. *Roe*, 410 U.S. at 156-162.

Moreover, petitioners could not argue, indeed do not argue, that we know more now than in 1986, when the Court upheld the right to choose abortion in *Thornburgh*, 476 U.S. 747, or in 1983 when it decided *Akron*, 462 U.S. 416. The same arguments were made and rejected by the Court in these cases. In *Akron*, the Court enumerated the "especially compelling reasons for adhering to *stare decisis* in applying the principles of *Roe v. Wade*:"

> That case was considered with special care. It was first argued during the 1971 Term, and reargued—with extensive briefing—the following Term. The decision was joined by The Chief Justice and six other Justices. Since *Roe* was decided in January 1973, the Court repeatedly and consistently has accepted and applied the basic principle that a woman has a fundamental right to make the highly personal choice whether or not to terminate her pregnancy. *See Connecticut v. Menillo*, 423 U.S. 9 (1975); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976); *Bellotti v. Baird*, 428 U.S. 132 (1976); *Beal v. Doe*, 432 U.S. 438 (1977); *Maher v. Roe*, 432 U.S. 464 (1977); *Colautti v. Franklin*, 439 U.S. 379 (1979); *Bellotti*

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19 *See also Drama of Life Before Birth*, Life Magazine, Apr. 30, 1965 (showing color photographs, eight years before *Roe*, of fetuses in utero); K. Luker, *Abortion & the Politics of Motherhood* 23-27 (1984) (discussing widespread knowledge of fetal development in the Nineteenth Century and stating that early "[p]opular (and legal) acceptance of abortion was not based on ignorance of 'the facts,' as physicians asserted, but on *a different moral evaluation of the facts*.") (emphasis in original).

v. Baird, 443 U.S. 622 (1979); *Harris v. McRae*, 448 U.S. 297 (1980); *H.L. v. Matheson*, 450 U.S. 398 (1981).

462 U.S. at 420 n.1. The petitioners in this case offer no new information and no original rationale for reversing this Court's long-established precedents.

CONCLUSION

For the foregoing reasons, the petitions for a writ of certiorari should be denied.

November 2, 1988

Respectfully submitted,

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

CASE NO. 88-158036-DM

JUDGE VALDEMAR WASHINGTON

SHAWN KATHLEEN LEWIS,

Plaintiff

—v.—

CARLTON JAMES LEWIS,

Defendant

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AFFIDAVIT

STATE OF MICHIGAN)
COUNTY OF GENESEE) ss.

NOW COMES Plaintiff-Appellant, SHAWN KATHLEEN LEWIS, and after being duly sworn deposes and says:

I believe I first met my husband in February of 1985. I met him through some friends of ours. A group of about 17 of us all went camping together in northern Michigan in May 1985. We didn't start dating until October 1985.

In December of 1985, he moved into my home; and, we got engaged in February 1986. We were married in July 1986 and we had been married two weeks when I found out that I was three weeks pregnant. From that day on, I was continually ill. I had high blood pressure, high blood sugar, kidney infection (for which they hospitalized me for a week). I was restricted to my bed for three months before I had Christopher, who was born on April 9, 1987. I was unable to take care of my husband or my house; and, my mother had to come in to clean and cook for us.

Carl left three times during the pregnancy for about two weeks each time. Just before Christmas 1986 he left. He said that he couldn't handle it that I couldn't go anywhere or do anything and that I was constantly ill. He went and lived with

his brother; and, at that time, he stated that he did not want the child that I was carrying. I went to his brother's house and begged him to come back.

He left again the end of January or beginning of February 1987. We were fighting because he wanted to go to his cousin's home, someone I didn't approve of because he is a heavy drinker and Carl was influenced by this cousin. I wanted him to stay with me; but, he told me to get out of the car and dropped me off by the overpass at Court Street and Dort Highway. I walked home in the snow, 7 months pregnant, in cowboy boots and a light jacket. I got about three blocks from home after I had walked almost two miles when he sent a friend, Joe Stevens, to pick me up. When I got home, Carl had taken all of his things and moved to his brother's.

I don't remember the specifics of when he left the third time during my pregnance [sic]; however, when Christopher was born in April, when he was 5 weeks old—about May 24th, which is around the time he beat me up (a copy of the police report is attached), he left again. At that time, I was undergoing heart testing because my father had just had open heart surgery for a diseased valve which was hereditary. In addition, I had an infection in my tubes from the pregnancy.

When he left that time, both Carl and his mother threatened to take Christopher away from me. I was in the phone booth at the hospital talking to Carl on the phone when his mother got on the phone and said they were going to get a lawyer to take the baby away from me. I was at the hospital visiting my father.

At that time we had been fighting a lot because I didn't want to let his mother take care of Christopher. Each time I let her take him, she wouldn't feed him every three hours as directed and he returned with diaper rash because of her not changing his messy diapers. Each time I let her take care of Christopher, he was a mess by the time I got back. Carl and I fought because I wanted my mother to watch Christopher but didn't want his mother to.

When Carl left that time, he went to his mother's for at least two weeks. Each time he was gone, he was gone about two weeks—long enough to get a full paycheck and spend it on himself. Then he would come back.

After he came back home, he didn't have a lot of patience with the baby. He never bathed the baby. Once in a while, he'd change a diaper. More or less, Christopher got in the way because we couldn't do things like we had been able to do before Christopher was born. He worked second shift and would want to go out after he got home from work. I couldn't go out because I would have to be up at 6 o'clock in the morning and take care of the baby. We fought a lot about that.

I never left Carl alone with Christopher very often because he would run out of patience and yell. One time when I let [sic] him with Christopher, he let Christopher fall off the couch and badly scratched his head.

Things were better until he left again November 1, 1987. He took our son trick-or-treating the night before and I thought everything was okay. He left and went to his mother's house. The next day he called my parents and told them that he no longer could handle it, that he didn't want the responsibility of Christopher and me, and to find someone else to take care of us. On November 2nd, I went down and filed for ADC.

At that time, the heat bill was at least 2 months behind, the water was to be turned off, and the phone had been turned [sic] because the bills hadn't been paid in a couple of months. He spent the money on his dune buggy. I applied for emergency help for the water, emergency food stamps, and I had to borrow money from my parents for diapers, etc.

In January, the day I filed for divorce and custody of Christopher, the reason I called Mr. Swirtz was because Carl had called and threatened to take Christopher and move down south so I would never see Christopher again.

Carl had a nervous breakdown near the end of February. He had broken into my house (police report attached). Dr. John Stoker treated him with anti-depressants. He was hospitalized but I don't know for how long or where he was hospitalized. I talked with Mr. Swirtz about it. He, in turn, talked to Carl's attorney who denied it. I was concerned about allowing Carl to have Christopher for visitation because of the medication he was on and the alleged drug overdose of prescription pills and cutting his wrists.

After that, we met with Mr. Swirtz and Mr. Moss. At that time, we decided to go to a marriage counselor. We went approximately five times and then Carl wouldn't go anymore. I talked to Mr. Earley over the phone after that; and, he told me that those things often happen when 1 spouse is told that things that happened and his reasons for leaving are not legitimate reasons, and that Carl probably didn't want to acknowledge the problems he was confronted with so he stopped going.

During that time there were more break-ins (police reports attached). On March 6, Carl had broken into the home. I had left the phone book open to where I was. It was his visitation weekend. He dropped Christopher off at a neighbor's house because he didn't want Christopher any more (copy of statement from neighbor is attached). I pulled in the driveway and Carl was sitting out in the street. He said, "Your precious little son is at one of the neighbors' houses."

I went inside the house and called the police. Before they arrived, I wanted [sic] to three different houses to look for Christopher before I found him. I returned to the house and there was broken glass everywhere and the front screen was all bent and ripped. Once I got inside the house, I sat down with Christopher and waited for the police.

While I was waiting, Carl returned and he was standing over me when Policeman Chris Blinkilde arrived. The officer asked me what was happening and he separated Carl and me. I told him I wanted Carl out of the house, that he had broken into the home through the front window. At that point, Carl took a handful of pills out of his pocket and put them into his mouth in front of the officer. The officer handcuffed him, put him in the police car and took him downtown.

Just before Father's Day, I told Carl that he could have visitation on Father's Day; and, on Father's Day morning, Carl called to say that the didn't want Christopher that day. So, I took the baby to my parents' house where we spent the day.

Since then, the break-ins have continued and on July 1st, he refused to pay any additional child support. He didn't pay any support again until September, just before we went to court for the abortion issue.

Since the Circuit Court hearing on the abortion issue, he has continuously harassed me, threatened me. I've had to leave my home because he wouldn't leave us alone. He would call at 1 o'clock in the morning, 5 o'clock in the morning. After I went to stay with my parents in Waterford, he still called long-distance to harass us.

I did inform the Friend of the Court of my leaving town and the reasons. I was concerned with visitation at that time; and, I did talk to Nancy Stockham regarding allowing him visitation. She told me not to worry about letting Carl have visitation. She said that situation was unstable and that I shouldn't worry about the visitation. An investigation was pending. Following that, both Mr. Swirtz and Nancy Stockham went on vacation.

Since then, it has been complete harassment and threats. He has called at least two or three times a day. If he didn't call, he was there in the morning and at night. He would stand outside banging and screaming and yelling and pounding on the windows. The police were usually called. One weekend he did it and three police cars came. They wouldn't do anything because he was just sitting in front of the house. I called Mr. Swirtz (on a Saturday) and he talked to the police officers but they still let him go.

On September 15, 1988, I was gone all day so I left the answering machine on. When my mother and I got home about 5 o'clock, there as a message from Carl; and, he said that if I had done what he thought I had done, he would take Christopher and I would never see him again and, "That's a promise."

At the present time, Carl is staying with his sister, Lynn Lester; his 9-year-old niece, Kandi Lester; and Ken Robertson, his sister's boyfriend. Sometime ago, I was at this house when Kandi came into the room and said to her mother, "Mom, I don't want to smoke a joint with you." Then Kandi went outside and brought in some little green "pods" and asked me if I wanted some "pot". I corrected her and told her they were pods and she said, "No, pot!"

I have received a letter from Carl's mother, Geraldine Lewis, dated May 23, 1987, in which she acknowledged that Lynn

smoked pot and, in Geraldine's opinion, that was no worse than drinking.

I am afraid that Carlton will kidnap Christopher to prevent me from having him and I am afraid to let Christopher go with Carlton for visitation at the home at which Carlton is staying.

I am willing to allow Carlton to have supervised visitation of Christopher; and, we have mutual friends, Bob and Eva Andrews, who live at Myrtle Grove Trailer Park and whose telephone number is 767-2571.

Further, Deponent sayeth not.

SHAWN KATHLEEN LEWIS
Shawn Kathleen Lewis

STATE OF MICHIGAN)
COUNTY OF GENESEE) ss.

Subscribed and sworn to before me this 16th day of September, A.D., 1988

ANN KAREN WICK
Ann Karen Wick, Notary Public
Genesee County, Michigan
My commission expires: 1-15-92

Prepared by:
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OFFENSE	CLASS	PIN	PIN	PIN	PIN	OFFENSE NO
ASSAULT	04LD					0016978

COMPLAINANT NAME	SX	AC	AGE	ST NO	STREET NAME	CITY	PHONE
LEWIS, SHAWN			23	3235	CHURCHILL AV		7361671

REPORTED BY	SX	AC	AGE	ST NO	STREET NAME	CITY	PHONE
LEWIS, SHAWN			23	3235	CHURCHILL AV	W	7361671

REPORTED TO	REPORTED PER	RCPT HOW	DATE	TIME	OCCURRED	DATE TIME	RPT	DISP	SUS	ARR
DURBIN COMPL	CX		05/24/2002		05/24/2002 1200	05/24/2002 1200	Y	N	Y	

ST NO	LOCATION OCCURRED	ESC MEANS	FROM	WEAPON/TOOL	RP INFA	P PTRL	DIST
3235	CHURCHILL AV			05/24/2002 1200			

VEHICLE MAKE	CODE	YEAR	BODY	MODEL	TOP	COLOR	BTM	LIC NO	YR	STATE	LOCKED VEH	LOCKED IG
											YES NO	YES

VIN

DIST FEATURE

INFO FROM

COMPL STATES THAT HER HUSBAND WHO MOVED OUT A WEEK AGO CAME OVER AND STARTED A FIGHT WITH COMPL. SUBJ HIT COMPL ON BOTHS ARMS AND LEFT SIDE. SUBJ THEN PUSH COMPL THRU THE SCREEN DOOR. SUBJ THEN LEFT.

MDOP 14 0004753

COMPLAINANT NAME	SX	RC	AGE	ST NO	STREET NAME	CITY	PHONE
LEWIS, SHAWN	F	W	24	3235	CHURCHILL AV		7360982
LEWIS, SHAWN	F	W	24	3235	CHURCHILL AV		7360982

HUSBAND SAME REPORTED PER TX REPT HOW 0215 88 1400 TIME 0215 88 1400 0021588 1400 DATE RPT DISP SUS ARR

ST NO 3235 CHURCHILL LOCATION OCCURRED AV ESC MEANS FROM WEAPON/TOOL 0052 0814 0468 TO DIST

VEHICLE MAKE	CODE	YEAR	BODY	MODEL	TOP	COLOR	BTM	LIC NO	YR	STATE	LOCKED VEH YES	LOCKED VEH NO	LOCKED IGN YES	LOCKED IGN NO

VIN DIST FEATURE INFO FROM

RPTS THAT EX-HUSBAND CAME OVER UNINVITED. CPLT WOULD NOT OPEN THE DOOR. SUSP KICKED THE DOOR IN, BREAKING SAME. HAS INS.

THEY ARE IN THE PROCESS OF GETTING A DIVORCE.

OFFENSE	CODE	PH	PH	PH	PH	OFFENSE NO
THREAT	24					0010422

COMPLAINANT NAME	SX	RC	AGE	ST NO	STREET NAME	CITY	PHONE	AM/PM
LEWIS, SHAWN	F	W	24	3235	CHURCHILL		H 7360982	
LEWIS, SHAWN	F	W	24	3235	CHURCHILL		W 7360982	

REPORTED BY	SX	RC	AGE	ST NO	STREET NAME	CITY	PHONE	AM/PM
JONES CMPLT	TX			040688 1425	040688120004068 8 1200		Y N	

REPORTED TO	REPORTED PER	REPT HOW	DATE	TIME OCCURRED	DATE TIME	RPT	DISP	SUS	ARR	WIT
3235 CHURCHILL		AV		FROM	0052 TO 0B14 0402					

ST NO	LOCATION OCCURRED	ESC. MEANS	WEAPON/TOOL	REP AREA	F PTRL	DIST	ENTRY

VEHICLE MAKE	CODE	YEAR	BODY	MODEL	TOP	COLOR	BTM	LIC NO	YR	STATE	LOCKED VEH YES	LOCKED VEH NO	LOCKED IGN YES	LOCKED IGN NO

VIN

DIST. FEATURE

INFO FROM

RPTS HER EX HUSBAND WHO HAS BROKEN INTO HER HOME BEFORE, CALLED THIS AM TO WARN THE CMPLT THAT HE WOULD DO SO AGAIN.

10a

| OFFENSE | CODE | FM | | |

UNLAWFUL ENTRY 05B1 0025092

COMPLAINANT NAME	SX	RC	AGE	ST NO	STREET NAME	CITY	PHONE	AM/PM
LEWIS, SHAWN	F	W	25	3235	CHURCHHILL ST		7360982	
LEWIS, SHAWN	F	W	25	3235	CHURCHHILL ST		7360982	

OFFENSE	REPORTED PER	REPT HOW	DATE	TIME	FROM	TO	RPT	DISP	SUS	ARR	WIT
BURGLARY	TX		08/08/88	1120	08/06/88	08/08/88					

NO	LOCATION OCCURRED	ESC MEANS	WEAPON/TOOL	PREMISE	F PTRL	DIST	ENTR
3235	CHURCHHILL ST						

VEHICLE MAKE	CODE	YEAR	BODY	MODEL	TOP	COLOR	BTM	LIC NO	YR	STATE	LOCKED VEH YES	LOCKED VEH NO	LOCKED IGN YES	LOCKED IGN NO

VIN

DIST FEATURE

INFO FROM

CPLT STS THAT A NEIGHBOR OBSVD HER HUSBAND, WHOM SHE HAS AN INJUNCTION AGAINST HIM, ENTERED HER HOUSE BY TAKING OUT FRONT DOOR GLASS. NOTHING KNOWN MISSING F/INSIDE HER HOUSE. HAS INS

12a

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

CASE NO. 88-158036-DM

JUDGE VALDEMAR WASHINGTON

SHAWN KATHLEEN LEWIS,

Plaintiff

—v.—

CARLTON JAMES LEWIS,

Defendant

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STATE OF MICHIGAN)
COUNTY OF GENESEE) ss.

NOW COMES Plaintiff-Appellant, SHAWN KATHLEEN LEWIS, and after being duly sworn deposes and says:

At approximately 12:30 p.m. today, Carl Lewis pulled up in the driveway. I did not hear him pull up. I heard a knock on the door and saw Carl Lewis' truck and immediately dead-bolted the door. I looked out the window. Carl said he wanted to come in and talk to me, and I would not reply. He proceeded to kick the steel door in, and enter my home. He started towards me, and my friend, Julie Murphy, immediately came between us. She grabbed his arm to pull him away, and I went to the other side of the room. He then began accusing me of killing his baby. He asked me if I did kill his baby, and I would not reply. Julie then spoke and said he did not know if that was true. Julie told him to leave, while I called the police. He left before the police arrived.

Further, Deponent sayeth not.

SHAWN KATHLEEN LEWIS

Shawn Kathleen Lewis

STATE OF MICHIGAN)
COUNTY OF GENESEE) ss.

Subscribed and sworn to before me this 28th day of September, A.D., 1988

MICHELLE R. RAMBURG

Michelle R. Ramburg, Notary Public
Genesee County, Michigan
My commission expires: 12-08-91

Prepared by:
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October 19, 1988

Carol Bowman
Genesee County Osteopathic Medical Association
3921 Beecher Road
Flint, MI 48532

RE: John Stoker, D.O.

Dear Ms. Bowman:

Enclosed please find a copy of the Affidavit that has been filed with the U.S. Supreme Court on my client's behalf. As you can see, it is Ms. Lewis' position that Dr. Stoker released information regarding her without her permission. This information was released with the prior knowledge that the parties were in a hotly contested divorce case regarding Ms. Lewis' wish to terminate her pregnancy. As is evident by the attached statement, Dr. Stoker had already given a written statement to Ms. Lewis indicating that the termination of her pregnancy was warranted for her health. The statement given to Mr. Lewis was directly contradictory to his previous statement and is in error. Both statements were written without a physical examination of Ms. Lewis having been had.

Ms. Lewis' wishes to have this matter investigated regarding Dr. Stoker's breach of the physician-patient privilege. Also, in light of the serious damage that the misdiagnosis has done to Ms. Lewis, she would request that Dr. Stoker be ordered to retract his diagnosis as not being accurate. If you need any further information from my client or me, please feel free to contact me.

Yours truly,

LINDA L. PYLYPIW
Linda L. Pylypiw
Attorney at Law

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988
Case No. 88-555

GENE MYERS, Guardian ad Litem,

Petitioner

—v.—

SHAWN KATHLEEN LEWIS,

Respondent

AFFIDAVIT OF RESPONDENT

NOW COMES the Respondent, herein, SHAWN KATHLEEN LEWIS, being first duly sworn, and says:

1. That your affiant is the respondent herein and the Plaintiff in the original cause of action, an action for divorce filed in Circuit Court for the County of Genesee, State of Michigan, Case #

2. That your affiant has been advised that attached to the Petitioner's Petition for Writ of Certiorari to the Michigan Court of Appeals filed with this Court is a statement from Dr. John Stoker, D.O. Your affiant has been further informed and believes that the statement was given to her estranged husband, Carlton Lewis, for use in the instant case.

3. That Dr. John Stoker was her treating physician for her first pregnancy.

4. That from the date of conception of the fetus at issue here, she has not been treated by Dr. John Stoker regarding her pregnancy. Dr. Stoker has not physically examined her in conjunction with the pregnancy at issue here. Dr. Stoker has only

spoken to your affiant on one occasion regarding this pregnancy.

5. That no release of medical records was signed authorizing release of information to Carlton Lewis, James Bopp, Jr., or anyone acting on their behalf, nor was a release of medical records given orally.

6. That your affiant does not wish to waive the Physician-Patient privilege to allow this information to be divulged.

7. That your affiant has filed a complaint with the governing body that licenses Osteopathic doctors against Dr. John Stoker, D.O., because of this breech of confidentiality.

Your affiant sayeth further not.

Dated: October 14, 1988

SHAWN KATHLEEN LEWIS

Shawn Kathleen Lewis

STATE OF MICHIGAN)
) ss
County of Genesee)

On this 14th day of October, 1988, before me personally appeared the above named SHAWN KATHLEEN LEWIS to me known to be the person named in and who executed the within affidavit and who stated under oath that the contents thereof are true to the best of her information, knowledge and belief.

JUANITA L. KUZAVA

Juanita L. Kuzava
Notary Public, Genesee County, Michigan
My commission expires: October 10, 1989

Prepared by:
LINDA L. PYLYPIW (P29578)

VALLEY MEDICAL CENTER

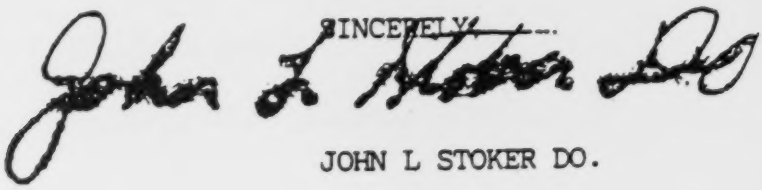
John L. Stoker, D.O., P.C.
G-5142 Miller Road
Flint, Michigan
(313) 733-3660

AUGUST 18,1988

TO WHOM IT MAY CONCERN:

SHAWN LEWIS HAD A DIFFICULT TIME WITH HER FIRST PREGNANCY ON THE DATE OF 04/09/87 AND SHE CANNOT HANDLE THE STRESS AT THIS TIME.

SINCERELY,



JOHN L STOKER DO.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988
Case No. 88-555

GENE MYERS, Guardian ad Litem,

Petitioner

—v.—

SHAWN KATHLEEN LEWIS,

Respondent

Case No. 88-____

CARLTON JAMES LEWIS,

Petitioner

—v.—

SHAWN KATHLEEN LEWIS,

Respondent

DECLARATION

1. I have read both the Petition for a Writ of Certiorari filed with the U.S. Supreme Court on behalf of Gene Myers on September 30, 1988 and the Petition for a Writ of Certiorari filed on behalf of Carlton Lewis on October 21, 1988. I submit this declaration to correct serious factual misstatements that appear in both petitions concerning a meeting that occurred in Judge Washington's chambers on August 19, 1988 in connection with this case.

2. To my knowledge, no transcript was made of the August 19th meeting.

3. I was not physically present at the meeting. Steven Moss was present in Judge Washington's chambers and I was contacted by telephone.

4. Both petitions state that during that conversation I conceded that Shawn Lewis' attending physician had made the medical judgement that an abortion was not medically necessary for Ms. Lewis' well-being. I made no such concession. I stated only that I had no medical documentation that an abortion was medically necessary.

5. I also never conceded that Dr. John Stoker was Ms. Lewis' attending physician in connection with this pregnancy, because he was not. Dr. Stoker never physically examined or treated Ms. Lewis in connection with this pregnancy. In addition, Ms. Lewis never consented to the release by Dr. Stoker of information about her medical condition. I have filed, on behalf of Ms. Lewis, a complaint with the Genesee County Osteopathic Medical Association requesting that Dr. Stoker be ordered to retract this diagnosis as inaccurate. Moreover, to the extent Dr. Stoker had information about Ms. Lewis' medical condition the release of such information was a breach of the physician-patient privilege.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 28, 1988

LINDA L. PYLYPIW

Linda L. Pylypiw

C#31565

68th DISTRICT COURT RECORD

(For misdemeanors)

Date 9-28-88 Time 2:01 PM. Officer Villarreal

Name Carlton J. Lewis Address 3073 W. Dayton #28

Offense Unlawful Entry

By Kicking in front door at 3235 Churchill

At 3235 Churchill

HISTORY

Sir:

On 9-28-88 (Wed) while assign to dist B-12, I received radio call to phone Sgt. Simms at the desk. I then called Sgt. Simms, and she informed me to stop by 3235 churchill because Mrs Lewis was having trouble with her ex-husband. At approx. 2:01 pm I stopped by 3235 Churchill when I was met by a f/w later I.D. as Shawn Lewis f/w/25 of 3235 Churchill. Mrs. Lewis then stated that at approx. 12:30 pm today her Husband Carlton J. Lewis came over to her house, at which Shawn locked the door Carlton then knocked several times but was not admitted to the house. At this time Carlton kicked the door opening same, Carlton then entered Shawn house and

CONT.

BUREAU OF IDENTIFICATION

CRIMINAL RECORD

stated to Shawn "HAVE YOU KILLED MY BABY YET, BECAUSE IF YOU DO I'AM GOING TO KILL YOU." At this time Shawn's room mate Julie Murphy f/w/24 grabed and threw Carlton out the door. Carlton then got into his truck and left from this location in unknown direction.

I then talked to Julie Murphy f/w/24 and she stated the same story as Shawn had stated.

Sgt. Simms arrived on the scene at approx. 1:50 pm, and gave the ok for I.B. to come out and take some pictures of the damage to the front door.

Mrs Lewis also stated that Walter Kosiba m/w/ad also witness the unlawful entry, because he was next door working on the house outside. Mr. Korsiba left a card with Mrs Lewis from East Village Construction phone #238-1499, but I have not been able to talk to him

On September 29, 1988 Sgt McManaman talked with Witness Walter Kosiba who stated that on 9-28-88 at approx 12:15A he was working in the area of 3235 Churchill when he observed a Chevrolet pick-up pull up at 3235 Churchill. The driver got out of the truck and ran up to the door. He banged on the door yelling, "You killed my baby". The subject opened the storm door and kicked the inner door with his right foot, gaining entry. Kosiba heard loud screaming and yelling coming from inside the house. The subject exited the house, got back into the truck, and drove away.

Sgt McManaman talked with complainant Shawn Lewis who related that in Nov, 1987 her husband Carlton Lewis, moved out of the home at 3235 Churchill. Due to the fact that he continued to return and break-in, eviction papers were served on her husband in April 1988 by Court Officer William McAuley. Carlton Lewis, upon receiving the papers, returned to the house and removed furniture. He has all of his personal items and clothing out of the house as they were taken out in November when he moved.

THE DETROIT NEWS
Saturday, October 1, 1988

Lewis says spouse threatened her life

Husband in Flint abortion case faces criminal charge
By Jim Mitzelfeld
News Staff Writer

A Flint man who lost a U.S. Supreme Court bid to stop his estranged wife from having an abortion has been accused of threatening to kill her and faces criminal and civil charges as a result.

Shawn Lewis' attorney filed a petition Friday to have her estranged husband, Carlton Lewis, found in contempt of court for violating an April 21 court order barring him from threatening or assaulting her.

AN ARREST WARRANT was signed Thursday charging him with unlawful entry—a misdemeanor—for a Wednesday incident during which he allegedly kicked in the door of his wife's house.

According to a Flint police report, Carlton Lewis barged into the house, demanded to know if she had had the abortion and said, ". . . if you did, I'm going to kill you."

Shawn Lewis was not injured during the confrontation, police said.

Monday, the U.S. Supreme Court refused to overturn a Michigan Appeals Court ruling upholding Shawn Lewis' right to an abortion despite her husband's objections. Her attorneys have refused to say whether she has had an abortion.

Genesee County Circuit Judge Valdemar Washington, who is presiding over the couple's stormy divorce, scheduled a court hearing for Monday to consider Shawn Lewis' charge that Carlton Lewis violated an injunction barring him from threatening her.

NO ARRAIGNMENT date has been set on the criminal charge, however, and police have no plans to look for Lewis because the charge against him is only a misdemeanor, Flint Police Capt. Michael Hanna said.

Arthur Swirtz, Shawn Lewis' divorce attorney, has also asked for a new court order barring Carlton Lewis from Shawn Lewis' Flint home.

Steven Moss, Carlton Lewis' attorney, said he couldn't comment on the alleged threat because he hasn't been able to locate his client.

"The biggest thing I've asked him is don't go over there, don't bother them," Moss said.

"If he did it, I can understand. He's hurting. I understand his grief but that doesn't mean that's the right thing to do.

"I don't know what I would do if that was me. I might beat the hell out of her."

ACCORDING TO court records, Wednesday wasn't the first time Carlton Lewis had threatened his wife with violence. A judge issued a restraining order in April warning him he would be thrown in jail if he tried to hurt his wife.

In court papers filed Friday by her attorney, Shawn Lewis claims Carlton Lewis called her Sept. 15 and ". . . said that if I had done what he thought I had done, he would take Christopher (the couple's son) and I would never see him again."

THE DETROIT NEWS
Wednesday, October 5, 1988

2 left bitter by abortion
Court case, media glare take toll on Flint couple

By Jim Mitzelfeld
News Staff Writer

Shawn Lewis said Tuesday she can understand why her estranged husband went to court to try and stop her from having an abortion, but she still believes getting an abortion was the right thing.

Carlton Lewis said he still has trouble understanding how the judicial system failed him, but said his wife now will have to face a higher authority—God.

"I do understand his side completely. I feel sorry for him," Shawn Lewis said in her first public comments since winning her seven-week court battle to overturn an Aug. 9 injunction barring her from having an abortion.

In an interview on the front steps of her modest, single-story wood-frame home in Flint, Shawn Lewis said she was relieved to finally tell her side of the story that drew national attention and dashed any hopes of saving their stormy marriage.

SHE SAID she has been taking life "one day at a time" and trying to get things back together in the wake of the U.S. Supreme Court ruling last week that cleared the way for her to terminate her 11-week-old pregnancy.

The 24-year-old unemployed mother said she doesn't believe she should have to explain why she wanted an abortion but admitted that the emotional and physical strain of her first pregnancy—which resulted in the birth of the Lewises' son, Christopher—convinced her she never wanted to have more children.

The heavy-set Lewis, whose red hair outlines a freckled, cherubic face, described how her veins collapsed and she was hospitalized for a week with a kidney infection during her first pregnancy. She suffered high blood pressure and a blood-sugar imbalance and was bedridden for the final two months.

Please see Lewis/12A

Lewis
Abortion battle leaves husband, wife both bitter

From page 1A

"I was sick all the way through it," she said.

THE ILLNESS she faced during her first pregnancy "was a big part" of her decision to have an abortion, she said.

She said she was moved to end her silence because there's been "so much garbage that's been printed" about the case. She said she was traumatized by the media coverage, which included television camera crews chasing her out of court.

"It was hard enough. That just made it harder," she said.

Carlton Lewis, broke and bitter about the refusal of the nation's highest court to halt the abortion, said he never will forgive his wife for her decision.

"I COULD tell she felt bad for me. But as far as her concern that she killed a baby, she didn't have any concern for that," he said, recalling his feelings when she admitted to him Sunday that she had gone ahead with the abortion.

"She was kind of callous, like it was never really there. Like it was a growth and a cancer and she just got rid of it."

He said his wife may have won in the courts but eventually will have to answer to a higher authority.

"I believe that there's a heaven and a hell. I guess Shawn better do a lot of praying or she's going to hell," he said.

SHAWN LEWIS said she's not surprised by her husband's angry words, but she said she tried to break the news to him as gently as she could. She denied his assertion that she only had the abortion to get back at him.

"No. Nothing was done to hurt him," she said. "Carl says a lot of things when he's angry. He asked about the abortion and I told him. I think he had a right to know more than anyone else."

Carlton Lewis, a 25-year-old school custodian, said the lengthy court fight left him with $10,000 in legal bills and shattered his faith in the American judicial system and the country.

He said his wife had an unfair advantage in the custody battle over the fetus

because she received the free legal assistance of the American Civil Liberties Union.

He was forced to pay his own attorney fees without any support from abortion opponents, who he labeled "hypocrites" for failing to lend any financial support.

THE ONLY help he's gotten so far, he said, were $70 in contributions from two individuals who read about his plight.

"The worst thing I'm worried about right now is I'm just flat broke. I don't know how I'm going to pay my bills. I don't even have food for myself."

Carlton Lewis said he brings home $180 a week from his job sweeping floors at the Genesee Intermediate School District's Center for the Severely and Physically Handicapped. Out of that, he has to pay $50 a week in child support, and he said he's behind in rent on his mobile home.

The thin, bearded husband talked about the case while sitting on a bench Tuesday in the Flint Police Department awaiting arraignment on a misdemeanor charge stemming from an incident last Wednesday when he allegedly kicked in his wife's door and threatened to kill her.

FLINT DISTRICT Judge Michael McAra accepted his not-guilty plea and released Carlton Lewis on his own recognizance. He faces an Oct. 24 preliminary hearing on one count of unlawful entry. The maximum punishment is 90 days in jail and a $500 fine.

Christopher Lewis denied threatening his wife, but Shawn Lewis said the couple's brief marriage was dotted with violence.

Records on file with Flint Police Department show that Shawn Lewis called the police on six different occasions between May 24, 1987 and Carleton Lewis arrest Tuesday. The complaints included her allegations that he broke into her house several times, hit her once and threatened to kill her on another occasion.

Carlton Lewis denied ever striking his wife, but added: "If it would have been any other man there, she would have had her butt kicked several times."

Carlton Lewis said the marriage fell apart because his wife refused to clean house, cook him dinner or do any-

thing. She said she accepts half the blame for their troubles, but thinks he also must accept responsibility.

He finally moved out last November, and she filed for divorce Jan. 20. She became pregnant July 7 when a spermicide she used failed during a brief attempt at reconciliation.

When he discovered she was pregnant, he went to court to bar her from having an abortion. The Michigan Court of Appeals lifted the injunction and the case was appealed until the U.S. Supreme Court refused to consider it on an emergency basis.

TUESDAY, Shawn Lewis said she is no longer afraid her husband will hurt her, but only hopes they can some day be friends again.

"I hope so. We have a son. So we have to try," she said. Carlton Lewis said he is just hoping that those in the public who believe he was right in fighting to see his child born will help him pay his bills.

"It would be nice. I would appreciate the help," he said.